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February 19, 2002

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, SW -- Room GWB204
Washington, DC 20554

Re: In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999, Broadcast Signal Carriage Issues
CS Docket No. 00-96

Dear Mr. Caton

This letter is written on behalf of WLNY-TV, Inc. and Golden Orange Broadcasting Co. to respond to arguments made by Echostar Satellite Corporation ("Echostar") in its February 12, 2002 letter to Acting FCC Secretary William F. Caton regarding 47 U.S.C. §338(d)'s prohibition of discrimination in signal access on navigation devices. Echostar's letter offers two theories regarding why Echostar's discriminatory broadcast signal carriage scheme does not violate Section 338(d)'s requirement of nondiscriminatory access to local signals on navigation devices. Neither theory offered by Echostar has any merit.

Echostar's First Theory

Echostar's first theory is that a satellite receive dish is not a "navigational device" within the meaning of Section 338(d), because (1) it is "common sense" that a "navigational device" is a device "used within the consumer's home to 'navigate' among the various channels offered"; and (2) the FCC's definition of navigation device "in another section of the regulations" does not encompass satellite receive dishes under "the well known canon of statutory construction *ejusdem generis*." Echostar letter at 3 & n.7. There are at least six problems with Echostar's first theory.

To begin with, another well known canon of statutory construction counsels that equivalent terms used in different parts of a statute are presumed to have the same meaning. *E.g., Cohen v. De La Cruz,* 523 U.S. 213, 220 (1998); *Gustafson v. Alloyd Co.,* 513 U.S. 561, 570 (1995). It must therefore be presumed – absent evidence to the contrary, and there is none – that Congress intended "navigational device" under Section 338(d) of the Communications Act to mean the same thing as "navigation device" under Section 629(a) of the Act. The definition which the FCC adopted to implement Section 629(a) thus also applies to Section 338(d).[1]

Second, the definition which the FCC adopted in implementing Section 629(a) is not merely "another section of the regulations," as Echostar puts it, but is also a word-for-word repetition of the precise language used by Congress in Section 629(a) of the Act itself. Like the FCC's definition, Section 629(a) describes navigation devices as "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems." 47 U.S.C. §549(a); *compare* 47 C.F.R. §76.1200(c); *see Report and Order* in CS Docket No. 97-80, 13 F.C.C. Rcd. 14775, 14784 (1998) (¶¶24-25) ("*Navigation Device R&O*"), *on recon.*, 14 F.C.C. Rcd. 7596 (1999) ("*Navigation Device Order on Reconsideration*"), *aff'd sub nom. General Instrument Corp. v. FCC,* 213 F.3d 724 (D.C. Cir. 2000). As the FCC concluded in adopting its definition, "the statutory language of Section 629 indicates that *its reach is to be expansive* and that Section 629 *neither exempts nor limits any category of equipment used to access* multichannel video programming or services." *Id.* (¶25) (emphasis added). The FCC thus specifically rejected *any limitation* on the scope of "navigation devices" under Section 629(a), other than the one contained in the Act itself – that the device must be used "to access" MVPD service. Echostar's theory that "navigational devices" must be limited "as a matter of common sense" to devices "used within the consumer's home to 'navigate' among the various channels offered" has thus already been rejected, and properly so, by the FCC.[2]

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[1] "Navigation device" and "navigational device" are plainly equivalent terms. Although Echostar asserts in passing that they are "not even the same term," it wisely does not press the point or try to explain what the "difference" is. There is no difference. "Navigational" is the adjective, or adjectival, form of the noun "navigation." Congress used the common adjective form to modify "device" in Section 338(d) and used the noun as an adjectival modifier in Section 629(a). The meaning in either case remains the same.

[2] In the *Navigation Device R&O,* the FCC specifically identified cable modems as a type of "navigation device." 13 F.C.C. Rcd. at 14784 (¶25). Cable modems are not "used to 'navigate' among the various channels offered" by a cable operator. Cable modems have no channel switching functions and are used solely to access the Internet access service provided over cable television systems. Satellite dishes similarly provide the capability to access DBS MVPD services. The fact that a cable modem is typically located inside the home while a satellite dish typically is not is, to be sure, a difference, but not one with significance under the Act. Both devices are customer premises equipment, and the fact that one is found in the den and the other is found on the roof has no more legal significance than the fact that one is square and the other is round.

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Third, another well known canon of statutory construction counsels that a statute is not to be interpreted in a manner which would render some of its provisions superfluous, meaningless or redundant. *E.g., United States v. Alaska,* 521 U.S. 1, 59 (1997); *Walters v. Metropolitan Educational Enterprises., Inc.,* 519 U.S. 202, 208-09 (1997). Echostar's suggested "*ejusdem generis*" interpretation of Section 629(a) would do just that. Section 629(a) defines navigation devices as "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services" provided by an MVPD system. 47 U.S.C. §549(a). Echostar argues that "other equipment used by consumers to access multichannel video programming and other services" should be construed to mean only devices "used within the consumer's home to 'navigate' among the various channels offered," which is to say certain types of *interactive communications equipment*. Section 629(a) specifically states that *all* "interactive communications equipment" used to access MVPD programs or services are deemed "navigation devices" under the Act, *and it then goes on to state* that *all other* equipment – meaning, necessarily, all *non-interactive* equipment – used by consumers to access MVPD service *are also deemed navigation devices* under the Act. Echostar's proffered "interpretation" would thus effectively read the final clause of the definition out of the Act by making it meaningless, and indeed nonsensical and inconsistent, surplus language. Such a reading would violate several well known canons of statutory construction of greater dignity than *ejusdem generis*. *E.g., United States v. Alaska, supra; Walters v. Metropolitan Educational Enterprises., Inc., supra; see also West Virginia University Hospitals., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) (statutory interpretation should make sense and not nonsense out of legislative enactments).

Fourth, the "well known canon of statutory construction *ejusdem generis*," on its face, has absolutely no application to Section 629(a) (or by extension Section 338(d)). Stripped of its Latinate gold plating, *ejusdem generis* is simply the common sense notion that a general term, when used in conjunction with a series of more specific terms, is likely to refer to other instances

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In addition, the FCC specifically observed in the NPRM in CS Docket No. 97-80 that "digital or data signal receivers" and "DBS, MMDS, or TVBS antennas" are used to receive and thus "to access" MVPD service, making them likely "navigation devices" under Section 629(a). *See Notice of Proposed Rule Making* in CS Docket No. 97-80, 12 F.C.C. Rcd. 5639, 5647-48 (1997) (¶¶16-18) ("*Navigation Device NPRM*"). In the same document, the FCC discussed current conditions regarding the commercial availability of "Primestar satellite receivers," noting that Primestar "requires a larger receiver" – *i.e.,* a larger satellite *receive dish*. *Id.* at 5649 (¶21). The FCC thus specifically inquired, in the *Navigation Device NPRM*, whether DBS receive dishes and similar reception devices should be considered "navigation devices" under Section 629(a), and it also indicated that it thought the likely answer is "yes." In the *Navigation Device R&O,* the FCC made its tentative view final, finding: "Section 629 *neither exempts nor limits any category of equipment used to access multichannel video programming or services*." 13 F.C.C. Rcd. at 14784 (¶25) (emphasis added); *see also Navigation Device Order on Reconsideration,*14 F.C.C. Rcd. at 7597 (¶1) (noting that navigation devices include "direct broadcast satellite receivers" which are "necessary to the receipt, processing, or display of the underlying communications service involved").

similar to the specific terms listed. *See, e.g.,* BLACK'S LAW DICTIONARY 517 (6th ed. 1990). Section 629(a) contains no list of specific terms. It contains *one* specific term, "converter boxes," one general term, "other interactive communications equipment," and a second, equally general and distinct term – "other equipment used by consumers to access multichannel video programming and other services." *Ejusdem generis* thus has no conceivable rational application to the interpretation of Section 629(a).

Fifth, even if the "well known canon *ejusdem generis*" did have some conceivable bearing on the interpretation of Section 629(a), the canon would be of use only if the statute's general term was ambiguous. *E.g., Gooch v. United States,* 297 U.S. 124, 128 (1936); *United States v. Espy,* 145 F.3d 1369, 1371-72 (D.C. Cir. 1998). There is nothing ambiguous about either Section 629(a) or the parallel language of the FCC's rule. Section 629(a) defines "navigation devices" as "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services" offered on an MVPD system. 47 U.S.C. §549(a). Equipment "used by consumers to access" MVPD service is *not* an ambiguous concept. It is a plain and straightforward concept, and its meaning is equally plain. It means what it says: Equipment used by consumers to access MVPD service. One *very* well known rule of statutory construction, indeed the *primary* rule of statutory construction, is that if the language of the statute is unambiguous, its plain meaning controls, absent some indication (and there is none here) that its plain meaning is not what Congress intended. *E.g., Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475 (1992); *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989). This first principle of statutory construction is the one the FCC properly employed in determining, correctly, that Section 629(a) "neither exempts nor limits any category of equipment used to access" MVPD service. 13 F.C.C. Rcd. at 14784 (¶25).

Sixth, and most important of all, the "well known canon of statutory construction *ejusdem generis,*" like any other presumptive guide to statutory meaning, is *not* to be applied if to do so would defeat Congressional intent. *E.g., Gooch v. United States,* 297 U.S. at 128; *FTC v. MTK Marketing, Inc.,* 149 F.3d 1036, 1040 (9th Cir. 1998), *cert. denied sub nom. Frontier Pacific Insurance Co. v. FTC,* 525 U.S. 1139 (1999); *Leslie Salt Co. v. United States,* 896 F.2d 354, 359 (9th Cir. 1990), *cert. denied,* 498 U.S. 1126 (1991). That is exactly what would happen under Echostar's misbegotten "*ejusdem generis*" theory. As the NAB and many commenting stations have pointed out, the legislative intent behind Section 338(d) is very clear: Congress intended "to ensure that satellite carriers position local stations in a way that is *convenient and practically accessible to consumers,*" and thereby sought to preserve both diverse local broadcast service and fair competition in local markets.[3] Echostar's discriminatory carriage scheme utterly thwarts these goals of Congress, and a statutory interpretation which would ratify Echostar's discrimination would not simply defeat Congressional intent – it would totally destroy the "carry one, carry all" provisions of the Act. "*Ejusdem generis,*" even were it applicable here, and it plainly is not, is much too weak a legal lever to turn an Act of Congress on its head.

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[3] See, *e.g.*, the NAB's February 13, 2002 Supplemental Filing at 2 & 4-5, quoting, *inter alia,* SHVIA Conference Report, 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999) (emphasis added).

Echostar's Second Theory

Echostar's second theory is that, assuming satellite receive dishes are indeed navigational devices under Section 338(d), Echostar's discriminatory carriage scheme is nevertheless lawful, because "there is nothing in the statute or regulations that suggests providing a second dish for free" is discriminatory. There is one problem with Echostar's second theory. The assertion that it is not discriminatory to relegate Echostar's "disfavored" independent, foreign language and noncommercial stations to secondary "wing slot" satellites that require a second receive dish and are received by only a small fraction of Echostar's subscribers is as obviously false a proposition as the FCC is ever likely to encounter.

For the foregoing reasons, Echostar's theories regarding Section 338(d) are completely without merit and must be rejected.

Sincerely

/s/ J. Brian DeBoice

J. Brian DeBoice

cc: Attached Service List